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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

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REPLY BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

The first two paragraphs of respondents' brief reveal fundamental deficiencies in the merits of their case as well as their capacity to maintain it. They affirmatively proclaim that precisely because "most jurisdictions offer comparable tax breaks," the tax credits they challenge "only have *minimal impacts on business decisions*." Resp. Br. 1 (emphasis added). That is a devastating concession because it means that, far from coercing Ohio companies to invest in-state rather than elsewhere, Ohio's investment tax credit (ITC) has, at the very most, a "minimal" potential impact on Ohio's economy or interstate commerce generally.

Respondents thus acknowledge their objection is not that the ITC raises barriers to their ability to compete fairly in interstate commerce—from time immemorial, the central concern of the dormant Commerce Clause. Rather, respondents' real complaint is the supposed "high costs on states and localities in lost tax revenues" from "tax breaks" targeted to certain businesses and the resulting "shift of the costs of state and local government to other classes of taxpayers, like Respondents." Resp. Br. 1, 4. But this generalized grievance—entirely divorced from the purposes of the Commerce Clause, available in equal measure to all taxpayers of Ohio, and predicated only on claims of injury that are, at the very most, uncertain, remote, attenuated, and speculative—cannot possibly satisfy the "irreducible minimum requirements" for Article III standing.

Even if respondents could establish jurisdiction, their concession that the ITC has no significant impact on interstate commerce is just as surely fatal to the merits of their claim. Respondents would have this Court extend the preemptive force of the dormant Commerce Clause to invalidate not just state laws that obstruct interstate commerce, but all state policies of "taxation and regulation that advantage[] in-state economic activity." Resp. Br. 1. This Court, however,

has never construed the dormant Commerce Clause to intrude so deeply into state fiscal policies and essential police powers. Respondents' vision of "national control[]" over the economy (*id.*) conflicts irreconcilably with the Constitution's fundamental structural commitment to federalism.

Ohio's ITC is available to in-state and out-of-state competitors on equal terms. Its manifest purpose is to attract investment, whether from within the State or from without. It imposes no burdens on or impediments to interstate commerce. It assesses no taxes on out-of-state actors or actions. And it does nothing to impair or inhibit the free flow of trade. Indeed, as 18 amicus briefs on behalf of nearly 80 public and private entities attest, credits such as the one offered by Ohio not only encourage interstate commerce, they are vital tools in both domestic and foreign competition for business and job development. This tax incentive does not violate the dormant Commerce Clause.

ARGUMENT

I. RESPONDENTS' NOVEL ARGUMENTS FOR TAXPAYER STANDING MUST BE REJECTED

A. Respondents Cannot Satisfy The Minimum Article III Requirements for Federal Jurisdiction

This is not a close case for standing. Respondents fail the first and most basic of the "irreducible constitutional minimum" requirements for Article III standing: a "concrete and particularized" "injury in fact" that is "actual or imminent," not "conjectural or hypothetical." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Respondents nowhere allege that they participate meaningfully in interstate commerce or are competitors with others that do. *See* J.A. 18a-19a. Rather, their sole allegation of jurisprudential injury is entirely unrelated to interstate commerce; respondents claim only that the ITC "deplete[s] the state coffers to which Respondents . . . must contribute" such that "either their contributions must be increased or the sum total avail-

able to fund programs on which they rely is diminished." Resp. Br. 12; *see also* J.A. 28a (Compl. ¶ 40).[1]

But this is no more than a claim that respondents have been exposed to "the burden of taxation in support of an [allegedly] unconstitutional regime." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982). This Court has long rejected taxpayer standing based on allegations that the challenged expenditure is "likely to produce additional taxation to be imposed upon a vast number of taxpayers." *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923). As this Court stated more recently, "a generally available grievance about government . . . seeking relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large -- does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also FEC v. Akins*, 524 U.S. 11, 23-24 (1998); *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 64 (1997).

A state taxpayer can satisfy Article III's injury-in-fact requirement only when the plaintiff alleges a "direct and particular financial interest" in the outcome of the litigation. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952). Respondents allege "not a direct dollars-and-cents injury," *id.* at 434, but a political difference. Far from demonstrating that the ITC increases their tax burden in some tangible way, respondents' brief makes clear that their alleged injuries are, at most, a matter of steep conjecture.

First, respondents freely admit that tax incentives like Ohio's are practiced virtually everywhere and have only "minimal impacts on business decisions." Resp. Br. 1. Thus, *a fortiori*, the ITC can have no more than "minimal" impact on respondents' taxes. *Second*, there is little reason to believe that, over the long run, the ITC reduces the revenues collected by the State. To the contrary, if the ITC functions

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[1] Respondents have abandoned any special claim to standing for Kim's Auto (through the eminent domain seizure of its property) or any standing claim at all for the Michigan respondents.

as the Ohio legislature intended, it encourages greater productive investments and economic activity in State, and thus greater taxable revenues—just the opposite of respondents' claims. Moreover, most capital investments will continue to generate tax revenue long after the seven-year ITC expires. *Third*, even if Ohio's revenues were depleted in exactly the manner that respondents allege, respondents point to no change in the taxes *they* now pay or the services *they* now enjoy, and they offer no reason beyond their *ipse dixit* that those taxes or services will be affected in the future. In the absence of any allegation of a "concrete and particularized" "dollars-and-cents injury," this Court's precedents require dismissal of the respondents' dormant Commerce Clause challenge for lack of standing.[2]

B. *Flast v. Cohen* Does Not Endow Taxpayers With Standing to Bring Commerce Clause Challenges To State Taxes

Respondents pointedly have dodged this Court's *Doremus* standard for state taxpayer standing in favor of a singularly broad interpretation of the test for federal taxpayer standing set out in *Flast v. Cohen*, 392 U.S. 83 (1968). Under their view of that decision, a federal taxpayer (and *a fortiori*, a state taxpayer) has standing whenever his challenge "is directed to an exercise of Congress's [or a state's] taxing and spending power," and "the suit rests on a constitutional

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[2] Moreover, this "injury" is unlikely to be redressed by the relief sought by respondents. First, if respondents' view of the dormant Commerce Clause prevails, the remedy that follows may be simply to invalidate the provisions of the statute that limit the credit to in-state investments, as did the New York Court of Appeals on remand from *Westinghouse*. *See Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 194 (1984). And even if the ITC were struck down *in toto*, respondents acknowledge that this only will cause states to offer a different menu of tax rate reductions or exemptions to businesses (Resp. Br. 47), and thus they concede that invalidation of the ITC will neither reduce their taxes nor provide additional funds for services. This failure of redressability is an independent reason respondents lack Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998).

provision that is a specific limitation on the exercise of [that] taxing and spending power." Resp. Br. 11-12.

Even assuming that, after *Lujan*, *Flast*'s "logical nexus" theory of taxpayer standing remains good law, *see Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 203 (2000) (Scalia, J., dissenting) (noting that its "'logical nexus' analysis" has "fallen into desuetude"), *Flast* cannot assist respondents in this dormant Commerce Clause case. Respondents point to no case *anywhere* that has invoked *Flast* to permit a taxpayer challenge under the Commerce Clause (much less the dormant Commerce Clause). Indeed, respondents themselves concede (at 12) that in the nearly 40 years since *Flast*, "only the Establishment Clause has been recognized," as falling within its "narrow exception" to the "general rule against taxpayer standing." *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

Respondents thus candidly seek to extend *Flast* far beyond its historically limited reach—an extension that would grant any taxpayer standing to challenge, under the dormant Commerce Clause, any state tax, even those paid only by *other* taxpayers. They justify this proposed extension of *Flast* solely on the basis that the Establishment Clause and the dormant Commerce Clause share—in respondents' view—"a similar historical role" as "specific limit[s] on discriminatory state taxation." Resp. Br. 13. This expansive exception would certainly swallow the rule against general taxpayer standing; for if the dormant Commerce Clause meets the test for "a specific constitutional limitation" on the government's "taxing and spending power" (Resp. Br. 12-13), then all manner of taxation and spending would fall within the *Flast* exception. Many other provisions in the Bill of Rights limit state (and federal) power to tax and spend. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating state sales tax under the Free Press Clause). And state powers are further circumscribed, both explicitly and implicitly, by constitutional provisions vesting authority in the executive and legislative branches. Respondents offer no reason why their argument would not

similarly extend taxpayer standing to any state tax challenge predicated on a state's alleged interference with the exercise of any enumerated federal power.

Even if, by some principle not apparent from respondents' reasoning, that remarkable expansion could be limited to the Commerce Clause, it would distort the Article III standing requirement beyond recognition. The allegations in this case are fundamentally different in character from those made in *Flast*. In *Flast*, the taxpayer's contention was "that his tax money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power" (392 U.S. at 106); the decision recognized the plaintiffs' "clear stake as taxpayers in assuring that they not be compelled to contribute even 'three pence . . . for the support of any one [religious] establishment.'" *Id.* at 114 (Stewart, J., concurring) (citation omitted); *see also id.* at 106 (majority opinion) (requiring a "nexus" between the alleged illegal conduct and plaintiffs' status as taxpayers). But respondents are not challenging the use of their property to fund a program that violates their rights. *See id.* at 103-04 (noting that the concern of those who drafted the Establishment Clause was that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general"). Rather, their argument is that *others* should be compelled to pay more taxes.

This distinction strikes at the heart of respondents' arguments for taxpayer standing. Though the failure to collect tax revenue might give rise to a cognizable injury to a *competitor*, respondents identify no decision—because there is none—where the Court held that the failure to collect taxes caused an Article III injury-in-fact to *taxpayers* as such.

C. Respondents' Other Arguments For Standing Are Meritless

Respondents make three additional arguments in support of their standing to pursue a dormant Commerce Clause challenge. First, they contend that they have municipal taxpayer

standing because some of Ohio's franchise tax revenue is remitted to municipalities. *See* Resp. Br. 15-17. But respondents offer no authority for this proposition and none exists. The theory behind municipal standing is that the taxpayer has a "direct and immediate" interest in the actions of the municipal corporation, *Mellon*, 262 U.S. at 486-87, but that theory has no application to a challenged *state* action, especially one that has only an attenuated relationship to the municipal fisc. Under respondents' trickle-down theory of standing, taxpayers may locate injuries in the state-wide impact of state legislation on local revenue. Given the vast array of federal and state programs that provide blocks grants and other funds to municipalities, respondents' theory is one of virtually limitless utility. In any event, respondents' complaint nowhere alleges that the fisc of the City of Toledo is injured by the ITC. *See* J.A. 14a-31a. Respondents allege only that the ITC "depletes the *funds of the State of Ohio* to which Plaintiffs contribute." *Id.* 28a (emphasis added). Respondents cannot here assert standing based on an injury they have not alleged below.

Second, Respondents contend that so long as they have Article III standing to bring their challenge to the City of Toledo's property tax abatement, they have "ancillary" or "pendent" standing to bring any additional claim "that can be spun out of the common nucleus of operative fact." Resp Br. 18-19. This argument, however, is squarely foreclosed by numerous decisions of this Court holding that standing must be analyzed on a claim-specific basis. *See, e.g., Allen v. Wright*, 468 U.S. 737, 752 (1984) ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted") (emphasis added). As this Court explained, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could

bring the whole structure of state administration before the courts for review. That is of course not the law." *Id.*

Finally, respondents argue that this Court's decision in *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996), dictates the waiver of prudential standing requirements in this case. Resp. Br. 27. But that decision is readily distinguished. *Caterpillar* concerned removal jurisdiction—not prudential standing. There, the Court overlooked error in the premature removal of a case when, by the time judgment was entered, the federal courts *had* jurisdiction over the case. *See* 519 U.S. at 73. It was in this context that the Court stated "considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75. Here, respondents do not claim that they fall within the zone of interests of the dormant Commerce Clause. Unlike *Caterpillar* or the other cases cited by respondents, the Court here has an institutional interest in enforcing the prudential requirements for standing. This is because the "zone of interests" requirement ensures that the issues are argued by a "reliable" advocate, rather than a plaintiff whose interests are only "marginally related to or inconsistent with the purposes implicit" in the constitutional or statutory provision on which he or she relies. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12, 399 (1987).[3] Respondents fall into this latter category and therefore have no standing.

For all these reasons, this Court should vacate the judgment below insofar as it invalidates the ITC for lack of stand-

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[3] Respondents also contend that enforcement of the prudential standing requirements would be "fundamentally unfair" in view of petitioners' arguments below that respondents had standing. Resp. Br. 27. But when DaimlerChrysler made that argument, it did so on the basis of the unique claims of injury arising out of the seizure of Kim's Auto's property. *See* C.A. J.A. 200-01. Respondents have since abandoned any claim based on Kim's Auto, apparently recognizing themselves that those injuries became unredressable no later than the close of the eminent domain proceedings. Respondents' claims of unfairness thus ring hollow.

ing and remand the case to the courts below with instructions that the ITC claim be dismissed.[4]

II. RESPONDENTS' EXPANSIVE VISION OF THE DORMANT COMMERCE CLAUSE CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS

Respondents' central contention is that the dormant Commerce Clause bars all state "measure[s] that provide[] preferential tax treatment,"—*i.e.*, "a lower effective tax rate"—"conditioned on in-state economic activity." Resp. Br. 9. This contention, however, finds no support in this Court's dormant Commerce Clause jurisprudence. Of course, as the late Chief Justice acknowledged, that jurisprudence has not been a model of clarity or consistency, *see Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) ("[T]he jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused"), and the language employed in some of its opinions may, from time to time, have been more expansive than the holdings of those decisions.

It is thus possible, as respondents demonstrate, to assemble a collection of out-of-context phrases to support the propositions that the dormant Commerce Clause bars all "incentive[s] 'to invest . . . within [the State] rather than to invest . . . in other States,'" Resp. Br. 42 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 757 (1981)), as well as "an[y] attempt to provide a positive incentive for increased business

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[4] Respondents' suggestion (at 28) that the "appropriate remedy is a remand of the case to the Ohio state courts," is strange in light of their separate challenge to the City of Toledo's property tax abatement. *See Cuno v. DaimlerChrysler Corp.*, No. 04-1407, Pet. for Certiorari (filed Apr. 18, 2005) (presenting question whether Sixth Circuit correctly decided that City of Toledo's property tax abatement did not violate the Constitution). As respondents note (at 18), under *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165-66 (1997), removal was appropriate even if only the property tax claim was within the federal court's jurisdiction. Remand to the state courts would therefore be appropriate only if this Court determines that the district court also lacked jurisdiction over respondents' other federal claim, an argument pressed by no party.

activity in [the State]." Resp. Br. 41 (quoting *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 393 (1984)). But the *holdings* of those cases do not advance any proposition nearly so broad, and the Court has repeatedly made clear that the States are free to take all manner of steps, including the use of their taxing and spending powers, to encourage local investment and development. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). A close examination of the *facts* of the cases cited by respondents demonstrates that the dormant Commerce Clause bars only state action that burdens, *i.e.*, imposes a cost upon, interstate commerce and does so in a manner that discriminates against out-of-state actors or transactions. This Court has never found a dormant Commerce Clause violation where state action only reduces the cost of in-state economic activity, and respondents suggest no reason tethered to the text or history of the Commerce Clause to do so now.

A. Respondents' View of the Dormant Commerce Clause Would Endanger Nearly Every Manner of State Economic Development Program

The cornerstone of respondents' dormant Commerce Clause argument—and the Sixth Circuit's holding below—is that there is no constitutional distinction to be made between a state law that penalizes out-of-state actors or conduct, and a state law that accords benefits to in-state actors or conduct. *See* Resp. Br. 39-40; Pet. App. 9a. Indeed, respondents ridicule any such distinction as advancing a "triumph of form over substance," claiming that, at least in the realm of economic action, every state-provided benefit necessarily carries with it a corresponding penalty that is visited on those ineligible for the benefit. Resp. Br. 43; *see also* Pet. App. 10a ("economically speaking, the effect of a tax benefit or burden is the same"). Accordingly, in respondents' view, the dormant Commerce Clause bars state action that "advantage[s] in-state economic activity." Resp Br. 1.

Respondents' view, however, cannot be reconciled with this Court's long-held view that "[d]irect subsidization of

domestic industry does not ordinarily run afoul of [the Commerce Clause]." *New Energy*, 486 U.S. at 278; *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (noting that "[the business] remain[s] within Maryland in response to market forces, including that exerted by money from the State."). Recognizing this, respondents now shrink even from using the word "subsidies." This is peculiar because a subsidy is surely the most direct of "advantages" a state can provide to in-state economic actors, and, at least until the case reached this Court, exactly what the respondents alleged the ITC to be. *See* J.A. 28a. Respondents instead now recast the ITC as a "discriminatory tax preference[] favoring in-state business location." Resp. Br. 1.

Innocuous though it may seem, respondents' newly minted terminology is an essential component of their argument. It is only by disavowing their earlier acknowledgment that the ITC was, in form and effect, a subsidy, that respondents can now argue that their expansive view of the dormant Commerce Clause is sufficiently cabined and "leaves wide latitude for state programs in support of economic development." Resp. Br. 48. Respondents contend that their version of the dormant Commerce Clause would ban only "preferential tax treatment conditioned on in-state economic activity," *id.* 9—more specifically, "'any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity.'" *Id.* 41 (quoting Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 815 (1996)). And though they remain silent on the topic of direct subsidies, respondents suggest that, under their view, not only across-the-board tax cuts, but also programs "ranging from worker training and infrastructure construction to low interest loans" all remain immune from dormant Commerce Clause attack. Resp. Br. 48.

Thus, ironically, even as they disparage as "formalistic" any distinction between benefits and burdens, respondents place great reliance on a formalism of their own design—a distinction between "tax breaks," on one hand, and other

forms of cash and non-cash benefits provided by states to assist local industry, on the other. This distinction, though, is illusory. The ITC is a one-time subsidy available to any company, whether or not already doing business in Ohio, that is willing to build a plant or otherwise increase its capital investment. To be sure, the ITC will lower a firm's "effective tax rate," but it is obvious enough that a cash subsidy can do so just as surely and effectively. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) ("effect [of tax] on Massachusetts producers is entirely . . . offset by the subsidy"). It is merely a question of accounting. More importantly, though, respondents fail to offer any cogent rationale why a tax benefit that operates in the same manner as a direct subsidy—a benefit simple for in-state activity—should be treated any differently.[5]

The one supposed "practical" difference respondents offer is "the relative ease with which tax breaks can be enacted and the difficulty and complexity of enacting expenditure programs." Resp. Br. 48-49 (citing Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 480-81 (1989)). Even if respondents' highly questionable political theory were to be accurate with regard to tax credits,[6] respondents suggest no reason why such "practical"—in fact, nakedly political—considerations have any value whatsoever in inter-

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[5] *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589-590 (1997), also is of no assistance to respondents. *Camps Newfound* relied on Establishment Clause precedent to establish the distinction between a cash payment and the exemption from a generally applicable "burden of property taxation." Id. at 50 n.24 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). But as nearly contemporaneous Establishment Clause cases demonstrate, tax *credits*—unlike exemptions—are indistinguishable from subsidies. *See, e.g., Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 789-90 (1973).

[6] To support their theory, respondents rely solely on a law review article that, in turn, relies principally on a magazine article from 1988. *See* Coenen, *supra*, at 481 n.485 (citing *Spending by Not Taxing*, The Economist, Jan. 23, 1988, at 51).

preting the Constitution. If there is a constitutionally significant difference between subsidies to attract investment and tax credits to attract investment, it cannot be found merely in a theory that subsidies, for some reason, in some states, under some circumstances, might be more difficult to dispense.

There is thus no basis for respondents' proposed categorical distinction between tax credits and subsidies (and similar non-cash benefits) provided by states. Accordingly, the limiting principle respondents attempt to erect in reliance on that distinction collapses of its own weight. If it is true that the benefit from the ITC creates a burden on businesses that invest outside Ohio, then other benefits to domestic industry—be they subsidies, stadiums, or even schools—also impose burdens on interstate commerce, and would be improper under respondents' sweeping vision of the dormant Commerce Clause. Contrary to respondents' assertions, the legal principle they espouse cannot be cabined simply to "preferential tax breaks," and this no doubt explains their efforts to abandon the use of the word "subsidy."

Respondents' vision of the dormant Commerce Clause would all but obliterate the limitation this Court placed on its sweep in *Boston Stock Exchange*, there holding that nothing in that Clause "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." 429 U.S. at 336. Under respondents' proposed expansion, the States' "police powers" to "encourag[e] domestic industry," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984), would be supplanted by "national control[]" over local economies, Resp. Br. 1, a notion at war with the very concept of a federal system of government.

B. The Ohio ITC Does Not Violate the Dormant Commerce Clause, Because It Does Not Impose A Burden On Interstate Commerce

Respondents argue that any state measure that provides a "lower effective tax rate . . . conditioned on in-state economic activity" violates the dormant Commerce Clause.

Resp. Br. 9. This theory must be rejected. In the realm of taxation, a lower effective tax rate for in-state actors is a necessary, but not a sufficient, condition for a dormant Commerce Clause violation. Both the text of the Commerce Clause and this Court's cases demonstrate that a state tax must also impose additional costs upon—and thus burden—out-of-state activity before a violation can be found.

Respondents deem this description of the reach of the Commerce Clause "novel," Resp Br. 39, and "radical," *id.* 44, but that is wrong. This Court has consistently adhered to this basic limitation. *See New Energy*, 486 U.S. at 273 (dormant Commerce Clause "prohibits . . . regulatory measures designed to benefit in-state economic interests *by burdening out-of-state competitors*") (emphasis added); *see also Oregon Waste Sys., Inc. v. Dept' of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994) (dormant Commerce Clause bans differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter*") (emphasis added). And respondents concede as much, for nowhere do they argue that the dormant Commerce Clause implicates state measures that do *not* burden interstate commerce.

The relevant question here is simply whether the operation of Ohio's franchise tax and ITC, regulates decisions to invest out-of-state by imposing financial burdens on such investments. Respondents contend out-of-state investments are so burdened by Ohio's franchise tax because it is "a tax on the apportioned share of the total income earned by corporations through the operation of an interstate business," and because even though such an investment will necessarily "reduce the share of the company's total income that is apportioned to Ohio, a substantial proportion of the income earned through that new [out-of-state] investment is still likely to be apportioned to Ohio." Resp. Br. 44, 45 n.13. If true, this would call into question the constitutionality of not just the ITC but the franchise tax itself. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) ("[A] State may not, when imposing an income-based tax, 'tax value

earned outside its borders.'" (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)).

But it is not true, and the very example that respondents herald in their brief demonstrates as much. *See* Resp. Br. 35 n.15 (citing Br. of Center on Budget and Policy Priorities (CBPP) as Amicus Curiae in Support of Respondents at A-1-A-7). In that example, before the "ABC Corp." made its out-of-state investment, it owed $39,100 in Ohio franchise tax. *See* CBPP A-1.[7] After ABC built its out-of-state plant, under the example's assumptions, ABC's tax liability to Ohio (at the same 8.5% rate), remained exactly at $39,100, *even though net income increased by 50%. See id.* A-5. The new income generated by the investment was attributed only to the State in which it was built; *none* of it was attributed to (and, thus, burdened by) Ohio. This demonstrates that under many (if not all) circumstances Ohio's franchise tax does not reach the income generated by out-of-state investments. This is sufficient to defeat respondents' facial challenge to the ITC. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

Moreover, respondents are clearly wrong when, defying common sense, they assert that "many" of the tax-and-credit schemes invalidated by the Court involved taxes that did not impose burdens upon the out-of-state conduct that was supposedly the object of the state's discrimination. Resp. Br. 45. *Westinghouse* certainly was not such a case. There the Court struck down a tax credit that depended on the ratio between in-state and out-of-state activity. *See* 466 U.S. at 400-02 & n.9. The Court recognized that because the tax credit was reduced when out-of-state activity increased—even when in-state conduct remained constant—the New York scheme had the "most pernicious effect" of "penaliz[ing] increases in the DISC's shipping activities in other States." *Id.* at 401 & n.9. The reduction of the New York tax credit functioned effec-

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[7] ABC Corp. starts with all of its property, all of its payroll and one-tenth of its sales in Ohio. CBPP Br. A-1. The resulting Ohio apportionment value of 0.46, when multiplied by both ABC's net income ($1 million) and the Ohio tax rate of 8.5%, yields an Ohio tax of $39,100.

tively as a New York tax on out-of-state activity; it raised the cost of doing business out-of-state.[8]

So, too, in the other cases cited by respondents. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), and *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), both invalidated exemptions from state property taxes: in *Camps Newfound*, an exemption from a Maine tax on real property that was fully available to non-profit entities unless they operated principally for the benefit of non-residents of the State, *see* 520 U.S. at 568-69, and in *Fulton Corp.*, an exemption from a tax on the value of corporate stock that was tied to the extent to which the stock issuer did business in North Carolina, *see* 516 U.S. at 328. In each case, the Court reasoned that because the tax exemption—like the DISC credit in *Westinghouse*—was reduced or revoked when the taxpayer engaged in business outside the State or with out-of-state actors, the tax exemption discriminated against interstate commerce. *See Camps Newfound*, 520 U.S. at 568-69; *Fulton Corp.*, 516 U.S. at 333. And contrary to respondents' suggestion (at 45) that these property taxes did not impose burdens on out-of-state conduct, the underlying property taxes manifestly applied—indeed, only applied—to

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[8] Respondents' suggestion that this "pernicious effect" was unnecessary to the holding in *Westinghouse* because the Court was "focused primarily on the benefits provided for New York activity," Resp. Br. 41, and that, by implication, the Court would have struck any tax credit that reduced an in-state exporters' effective tax rate, defies any fair reading of the Court's decision. *See Westinghouse*, 466 U.S. at 400 ("It is this *second adjustment, made only to the credit* and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York." (emphasis added)). It is further belied by the state court's actions on remand, where it severed only the portion of the tax credit formula that measured the ratio of in-state DISC activity to out-of-state DISC activity, effectively extending the DISC credit "to all of the DISC accumulated income attributable to the parent corporation, without regard to the exports' place of shipment." *See Westinghouse Elec. Corp.*, 63 N.Y.2d at 194.

those businesses that elected to engage in interstate commerce, notably among them, the plaintiff in each action.

In cases involving taxes on transactions, the out-of-state burdens are even more obvious. For instance, in *Maryland v. Louisiana*, the Court struck down Louisiana's "first-use tax" on natural gas transported into the State from the outer-continental shelf where offsetting credits were granted only to Louisiana residents. *See* 451 U.S. at 754-760. Louisiana's first-use tax thus was paid only by out-of-state gas consumers and thus functioned as a tax on interstate commerce itself. Respondents' notion that these taxes did not impose burdens on interstate commerce is clearly wrong.

In short, respondents thus have no answer to the argument that a state tax does not violate the dormant Commerce Clause unless—at a minimum—it imposes actual burdens upon the out-of-state conduct against which the tax supposedly discriminates. And Ohio's ITC simply does not impose any burdens on out-of-state activity. Indeed, respondents concede that it has little or no effect on business decisions because other State remain free to enact—and have enacted—comparable provisions, Resp. Br. 1. Thus, the ITC cannot be said to "coerc[e]" businesses to invest in Ohio, as the Sixth Circuit incorrectly held. Pet. App. 6a. The ITC does not penalize or otherwise burden a company for investing out of state and therefore does not violate the Commerce Clause.

In the end, it is respondents, not DaimlerChrysler, who elevate "form over substance." Resp. Br. 43. It is beyond dispute that Ohio could have reimbursed DaimlerChrysler for a portion of its capital improvements at the Stickney Avenue plant, or could have made a cash payout contingent on the company keeping its Jeep assembly plant in Ohio, and neither offer would have regulated or burdened DaimlerChrysler's decision to invest elsewhere had it ultimately done so. For this same reason, Ohio's offer of an ITC to companies that make a capital investment does not regulate or burden interstate commerce. Respondents' contention to the con-

trary is disproved by their own example. This Court accordingly should find that the ITC operates solely as a subsidy to in-state investment, and should reject respondents' suggestion that such an in-state benefit necessarily creates out-of-state burdens.

C. Respondents Fail to Demonstrate That Ohio's ITC Discriminates Against Interstate Commerce

Even if this Court were to accept respondents' contention that the benefit the ITC accords to in-state investors itself reflexively imposes a burden on out-of-state investors, such a burden violates the dormant Commerce Clause only if it constitutes discrimination against interstate commerce. The ITC does not.

Respondents do not dispute that a finding of discrimination against interstate commerce requires a predicate finding that in-state and out-of-state actors are similarly situated. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). Respondents also do not dispute that a corporation that invests in-state is not similarly situated, vis-à-vis the underlying franchise tax, to one that invests out-of-state. They acknowledge that when a firm invests in-state, it increases its Ohio apportionment value and, thereby, its exposure to Ohio's franchise tax, while a corporation with an Ohio presence that invests out-of-state decreases its Ohio apportionment value and its exposure to Ohio tax. Resp. Br. 34. Respondents contend, though, that this is an insufficient basis to justify different treatment of in-state and out-of-state investors. They argue, in essence, that in-state and out-of-state investors are situated similarly enough for dormant Commerce Clause purposes, even if not for other purposes.

In support of this argument, Respondents first contend that this Court, in *Westinghouse*, "directly rejected precisely th[e] argument" that differences in apportionment value can justify different treatment. Resp. Br. 34 (citing *Westinghouse*, 466 U.S. at 400-02 n.9). Respondents are wrong. Though the Court noted that it was "not unmindful" of the fact that increased in-state business activity results in a

higher apportionment value, the Court did not conclude that such differences, as a categorical matter, foreclosed different treatment. This is unsurprising because the "similarly situated" argument was not raised in *Westinghouse*—not by the State of New York and not by its amicus, the State of California. *See Westinghouse Elec. Co.*, No. 81-2394, Br. of Appellees (NY Br.); *id.* Br. of the State of Cal. as Amicus Curiae in Supp. of Br. of James H. Tully, Jr. (CA Br.); *see also Westinghouse*, 466 U.S. at 400 (corporations were "similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York").[9] This Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll. v. Katz*, No. 04-885, slip op. at 5 (Jan. 23, 2006) (citing *Cohens v. Virginia*, 6 Wheat. 264, 399-400 (1821)).

Finally, even if this Court finds the differences between in-state and out-of-state investors to be insubstantial, the out-of-state investors still suffer no coercion. To be sure, Ohio's ITC is available only to those who choose to invest in Ohio. But as respondents themselves state, these investment tax credits have "minimal impacts on business decisions, largely because most jurisdictions offer comparable tax breaks." Resp. Br. 1. Because of the widespread availability of these credits—a product of healthy competition among the states to create attractive investment environments—Michigan's investment tax credit did not impose an unconstitutional burden on DaimlerChrysler's decision to locate its Jeep plant in Ohio, any more than Ohio's ITC imposed a burden on its decision to expand its engine plant in Detroit, or its decision in December 2005 to invest $1 billion in two Missouri plants. *See* Gregory Cancelada, *Chrysler Will Invest $1 Billion at Fenton*, St. Louis Post-Dispatch, Dec. 13, 2005, at A1 (not-

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[9] Rather New York and its *amicus* relied principally on the assertion that "New York taxes only the income reasonably allocated to it." *See* NY Br. 8; CA Br. 9 ("New York is taxing only New York income."). For the reasons explained above this assertion was not true.

ing various state and local tax incentives totaling more than $75 million). In choosing where to locate investments, companies like DaimlerChrysler make rational economic choices among states (and foreign countries) that remain free to include tax credits and other tax breaks to reduce the cost of doing business in their locale. It is difficult, to say the very least, to divine "economic Balkanization" from a regime in which states are permitted to compete with each other to provide the best economic inducements for investment.

CONCLUSION

The judgment of the court of appeals should be vacated in relevant part and the case should be remanded with instructions that the respondents' federal challenges to Ohio's ITC be dismissed. Should the court reach the merits, the judgment of the court of appeals should be reversed in relevant part.

Respectfully submitted.

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